83660-4

Supreme Court No. _____
Court of Appeals No. 36944-3-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

TIMOTHY L. JACKOWSKI and ERI JACKOWSKI, husband and wife,

Plaintiffs/Respondents,

v.

HAWKINS POE, INC., dba Coldwell Banker Hawkins-Poe Realtors,

Defendants/Petitioners,

and

DAVID BORCHELT and ROBIN BORCHELT, husband and wife; HIMLIE REALTY, INC., VINCE HIMLIE, broker for Windermere Himlie Real estate, real estate brokers, and ROBERT JOHNSON and JEFF CONKLIN, real estate agents,

Defendants.

DEFENDANTS HAWKINS POE, INC. AND JOHNSON'S PETITION FOR REVIEW

Jeffrey P. Downer, WSBA No. 12625
Of Attorneys for Petitioners
Hawkins Poe, Inc. and Johnson

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I. IDENTITY OF PETITIONER

Petitioners Hawkins Poe, Inc. and Robert Johnson (hereinafter collectively "Hawkins Poe"), defendants at the trial court and respondents at the Court of Appeals, ask this Court to accept review of the decision identified in Part II below.

II. CITATION TO COURT OF APPEALS DECISION

Hawkins Poe asks this Court to accept review of (1) the decision by Division Two of the Court of Appeals, *Jackowski v. Borchelt*, 151 Wn. App. 1, 14, 209 P.3d 514 (June 16, 2009), which reversed the Mason County Superior Court's order dismissing the Jackowskis' complaint on summary judgment; and (2) Division Two's order, 2009 Wash. App. LEXIS 2094 (Aug. 11, 2009) denying defendants' motions for reconsideration.

III. ISSUES PRESENTED FOR REVIEW

1. Whether this Court should reverse the decision of Division Two because it wrongly creates new exceptions to the economic-loss rule for "common law and statutory claims" and professional-malpractice claims, in direct contravention of *Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 822, 881 P.2d 986 (1994).

2. Whether this Court should reverse Division Two's decision because it wrongly states that real estate professionals owe their clients supposed fiduciary duties, which RCW 18.86 *et seq.* abrogated.

3. Whether this Court should reverse Division Two's decision because it erroneously implies that RCW 18.86 *et seq.* creates a new right of action, whereas that statute was enacted to restrict rather than expand the liabilities of real estate professionals.

IV. STATEMENT OF THE CASE

Hawkins Poe represented the Jackowskis in their purchase of waterfront property in Mason County. CP 1256. The Jackowskis initially alleged claims against Hawkins Poe for negligent misrepresentation and unspecified "breach of duties." CP, 1392. Hawkins Poe successfully moved for summary judgment of dismissal of the negligent-misrepresentation claim. CP 834-36. The Jackowskis moved for leave to amend their complaint, adding a claim that Hawkins Poe "violated RCW 18.86.050(1)(c), for allegedly failing to advise plaintiffs, during the pendency of the real estate transaction at issue in this action, to seek the advice of a geotechnical expert." CP 492, 510-18. Neither the Jackowskis' first complaint, CP 1391-94, nor their amended complaint against Hawkins Poe, CP 514-18, alleged breaches of fiduciary duties or other specific duties at common law, other than negligent misrepresentation.

Hawkins Poe later moved for summary judgment on the sole remaining claim against it, for violation of RCW 18.86.050(1)(c), based on the economic-loss rule. CP 594-97. The trial court granted this motion

and dismissed the remaining complaint allegations against Hawkins Poe. CP 106.

Division Two reversed portions of the trial court's decision. It held that the Jackowskis' RCW 18.86.050(1)(c) claim was for professional negligence and that the economic-loss rule does not bar such claims. *Jackowski*, 151 Wn. App. at 14. Division Two also distinguished "statutory and common law duties" from those duties only assumed by agreement and held that the economic-loss rule does not bar "statutory and common law duties." *Id.* As part of this decision, Division Two held that the Jackowskis possessed such "statutory claims" under RCW 18.86 *et seq.*, *id.* at 15, which the court held did not abrogate fiduciary duties of real estate professionals. *Id.* at 14. It also concluded that the Jackowskis possessed "statutory claims" against Hawkins Poe. *Id.* at 15.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should accept review under RAP 13.4(b)(1), (2), and (4). Under RAP 13.4(b)(1) and (2), Division Two's decision conflicts with decisions by the Supreme Court and the Court of Appeals as to the economic-loss rule. Under RAP 13.4(b)(4), this decision involves multiple issues of substantial public interest, including the scope of civil liability of real estate professionals, and the applicability of the economic-loss rule to professionals.

A. Review is necessary under RAP 13.4(b)(1), because Division Two's decision conflicts with this Court's prior decisions on the economic-loss rule.

1. The economic-loss rule rigidly observes a "bright-line distinction" between tort and contract remedies.

The economic-loss rule holds parties to contract remedies when losses potentially implicate both contract or tort relief but the losses are more properly remediable only in contract. *Alejandre v. Bull*, 159 Wn.2d 674, 681, 153 P.3d 864 (2007); *Berschauer/Phillips*, 124 Wn.2d at 822. This rule recognizes that tort law, which addresses danger to the health and safety of the public, differs from contract law, which protects expectation interests. *Alejandre*, 159 Wn.2d at 682. Important policy reasons for the economic-loss rule include maintaining certainty and predictability in allocating risk and avoiding "liability in an indeterminate amount for an indeterminate time to an indeterminate class." *Id.* at 684 (citation omitted). Recognizing this, the economic-loss rule prevents a party from bringing a "cause of action in tort to recover benefits they were unable to obtain in contractual negotiations." *Berschauer/Phillips*, 124 Wn.2d at 827. In contrast, this decision by Division Two would allow contract and tort remedies to overlap, thus ignoring the "bright line distinction between the remedies offered in contract and tort with respect to economic damages," *id.* at 826, undermining the parties' incentive to allocate risk and their ability to rely on the certainty of such allocation.

Application of the economic-loss rule fundamentally depends on: (1) the loss, and (2) the opportunity to allocate risk. Washington courts have first looked at the nature of the loss and the manner in which the loss occurs to determine if the losses are economic. *See Alejandre*, 159 Wn.2d at 684. Losses not reflecting personal injury or physical harm to property are generally considered economic losses. *Id.* at 685; *Berschauer/Phillips*, 124 Wn.2d at 825. Division Two correctly recognized and applied this first step, holding that all the Jackowskis' claimed damages were entirely economic losses. *Jackowski*, 151 Wn. App. at 12-13.

Washington courts apply the economic-loss rule where "the parties could or should have allocated the risk of loss, or had the opportunity to do so." *Alejandre*, 159 Wn.2d at 687; *Berschauer/Phillips*, 125 Wn.2d at 828. In considering the ability to allocate risk, Washington courts do not consider the sophistication of the parties. *Id.* at 827 (aligning the common law with the Washington Product Liability Act that applies the economic-loss rule to unsophisticated consumers); *Alejandre*, 159 Wn.2d at 689 n.5 ("exact parity in bargaining power is not required"). The significance of this requirement is clear: For parties to be held to contract remedies and bargained-for risks, they must have had meaningful opportunities to negotiate such risks. Division Two implicitly recognized this second step was satisfied, because it observed that the Jackowskis were in contractual privity with Hawkins Poe. *Jackowski*, 151 Wn. App. at 12. However,

despite clear precedent to the contrary, Division Two refused to apply the economic-loss rule to all claims against Hawkins Poe.

To avoid applying the economic-loss rule, Division Two created an unprecedented distinction:

> Neither do we believe that the economic loss rule, as described in *Alejandre*, abrogates all professional malpractice claims, particularly where a client hires a professional and, therefore, establishes a privity of contract with that professional... . We are not willing at this time to expand our Supreme Court's holding in *Alejandre* to preclude all recovery for economic loss against professional agents, as to do so would be to abrogate professional malpractice claims for all cases not involving physical harm.

Id. at 14. But such a substantive distinction directly conflicts with this Court's decision in *Berschauer/Phillips*. In that case, the plaintiff general contractor, Berschauer/Phillips, alleged that the defendant architect's and defendant engineer's architectural and structural plans were inaccurate and incomplete and that the defendant inspection firm "was negligent for failing to competently inspect the erection of the structural steel" on the job and that "these acts of negligence significantly increased the cost to renovate and construct" the building. *Berschauer/Phillips*, 124 Wn.2d at 819-20. This Court nevertheless adopted the economic-loss rule and applied it to defeat these professional-malpractice claims against the architect, the engineer, and the inspection firm. This Court expressly stated, "We hold the economic loss rule does not allow a general

contractor to recover purely economic damages from a design professional in tort." *Id.* at 833. It is impossible to reconcile this statement from, or the outcome of, *Berschauer/Phillips* with Division Two's decision here.

Division Two's decision here reveals an upside-down understanding of the issue of privity under the economic-loss rule. Division Two, by stating that the economic-loss rule does not apply to malpractice claims "**particularly** where a client ... establishes a privity of contract with that professional," implies that the economic-loss rule has less force where parties had the opportunity to allocate risk through contract. *Jackowski*, 151 Wn. App. at 14 (emphasis added). But as this Court has noted, the economic-loss rule encourages the desirable result that the parties allocate risk where they had the opportunity to do so. *See Berschauer/Phillips*, 124 Wn.2d at 827. Division Two inverts that desired policy effect, and allows parties to effectively rewrite agreements, "recoup a benefit that was not part of the bargain," and otherwise interfere with parties' freedom to contract. *Cf. Alejandre*, 159 Wn.2d at 688.

2. The economic-loss rule applies to claims based on statutory and common-law duties.

Division Two also misconstrued isolated language from the *Alejandre* decision in a way that contravenes the policy bases underlying the economic-loss rule. Division Two focused on the fact that the *Alejandre* decision noted that "tort law is not intended to compensate

parties for losses suffered as a result of a *breach of duties assumed only by agreement.*" *Jackowski*, 151 Wn. App. at 14 (quoting *Alejandre*, 159 Wn.2d at 682) (emphasis added by *Jackowski* court). Division Two then held that "statutory and common law duties" are not assumed only by agreement and thus the economic-loss rule does not apply. *Id.* However, such an interpretation of this isolated language misses the purpose of the economic-loss rule and directly conflicts with prior appellate decisions.

Beyond this isolated language, the *Alejandre* decision illustrates this conflict. The *Alejandre* court clearly established that risks, and impliedly duties, need not be expressly established within the contract for the economic-loss rule to apply. The court warned parties not to misinterpret isolated language in *Berschauer/Phillips*: "We did not say [in *Berschauer/Phillips*], however, that parties will be held to their bargained-for remedies only if they explicitly addressed any or all potential economic losses and allocated the risks associated with them." *Alejandre*, 159 Wn.2d at 686-87. Instead, "all that is required is that the party had an opportunity to allocate the risk of loss." *Id.* Thus, the economic-loss rule applies regardless of whether parties have expressly agreed to assume certain duties or risks.

Expanding this theory to exclude "common law and statutory duties" from the economic-loss rule conflicts with prior appellate decisions and threatens to defeat the purpose of the economic-loss rule. In

direct contrast, the *Alejandre* decision itself implicated "statutory duties." *See* RCW 64.06.010; *Alejandre*, 159 Wn.2d at 679. Although Washington law suggests that the economic-loss rule applies where relationships arise through agreement, no precedent limits its application to only those duties expressly discussed in the agreement. *See Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 799 P.2d 250 (1990), ("when parties' difficulties arise directly from a contractual relationship, the resulting litigation concerning those difficulties is one in contract no matter what words the plaintiff may wish to use in describing it."). Moreover, the economic-loss rule applies even where parties lack direct privity – in *Berschauer/Phillips*, the economic-loss rule barred the plaintiff from recovering in tort from a structural engineer with whom it had no contractual privity, even by assignment. *Id.* at 818-19. On this point, Division Two simply ignores the Supreme Court's observation that the economic-loss rule applies "when a loss potentially implicates both tort and contract relief." *Alejandre*, 159 Wn.2d at 682. The fact that losses implicate statutory duties or common law duties provides no exception to the economic-loss rule, and creating such an exception threatens to destroy all incentive for parties to bargain for enhanced risk protection. The broadest interpretation of the Court of Appeals' decision casts doubt on the continued existence of the economic-loss rule.

3. Prior Washington appellate decisions apply the economic-loss rule to tort claims against professionals.

Division Two's baseless exception to the economic-loss rule for professional malpractice conflicts with prior appellate decisions.

In *Berschauer/Phillips*, the Supreme Court applied the economic-loss rule to malpractice claims against three professionals. The plaintiff contractor in that case had been assigned claims against the architect, the structural engineer, and the inspector. *Id.* at 818-20. The fact that the defendants were professionals provided no exception to the economic-loss rule: the *Berschauer/Phillips* court held that the economic losses could only be recovered through contract claims. *Id.* at 828. Thus, Division Two's decision in this instance irreconcilably conflicts with Supreme Court precedent. *See also Carlson v. Sharp*, 99 Wn. App. 324, 994 P.2d 851 (1999), *accord.*

4. The economic-loss rule applies to all claims pleaded against Hawkins Poe.

Division Two contradicted prior precedent by refraining from applying the economic-loss rule in this instance. Division Two affirmed the trial court's determination that the losses were purely economic and observed that plaintiffs contracted with Hawkins Poe. *Jackowski*, 151 Wn. App. at 13-14. Prior decisions thus mandated that the economic-loss rule barred recovery except under contract claims. *Cf. Alejandre*, 159

Wn.2d at 684, 687. To justify its decision, Division Two invented exceptions for claims based on "common law and statutory duties" and for professional-malpractice claims. *Jackowski*, 151 Wn. App. at 13-15. But these exceptions are baseless, unsupported by citations to authority, and indeed conflict with reported decisions. This attempt to rewrite the economic-loss rule threatens substantial impact on the public's relationship with real estate professionals throughout Washington. This Court therefore should accept review of this erroneous decision.

B. Review is necessary under RAP 13.4(b)(2), because Division Two's decision conflicts other decisions of the Court of Appeals on the economic-loss rule.

Division Two's decision in this case ignores other Court of Appeals decisions. In *Carlson v. Sharp*, 99 Wn. App. at 330, Division Three applied the economic-loss rule to bar recovery under tort claims from a defendant professional. *Carlson* involved tort claims by a developer/contractor against a geotechnical engineer. *Id.* at 325-26. As a result of the geotechnical engineer's recommendations, soil movement damaged two mobile homes. *Id.* at 326-37. Division Three held that these damages implicated the parties' contractual bargaining, and thus the economic-loss rule precluded recover under tort claims. *Id.* at 330. The *Carlson* court did not distinguish between tort claims for professional malpractice versus other types of tort claims. Thus *Carlson*, like *Berschauer/Phillips*, shows that the economic-loss rule applies to claims

of professional negligence just as it applies to claims of negligent misrepresentation. Not surprisingly, Division Two's *Jackowski* decision did not acknowledge that *Carlson v. Sharp* exists or cite any authority for its novel "professional malpractice" exception to the economic-loss rule.

Likewise, Division Two's decision in this case utterly ignores *Cox v. O'Brien*, 150 Wn. App. 24, 206 P.3d 682 (May 5, 2009), a reported decision on the economic-loss rule that the same court had issued only six weeks earlier. In *Cox*, Division Two held that the economic-loss rule bars claims of fraudulent misrepresentation. *Id.* at 34-36. Here, Division Two held exactly the opposite as to the Jackowskis' claims against defendants Borchelt, *Jackowski*, 151 Wn. App. at 17, without even mentioning *Cox,* much less attempting to reconcile the two conflicting decisions. Division Two's decision in this case also ignored *Carlile v. Harbour Homes, Inc.*, 147 Wn. App. 193; 194 P.3d 280 (2008), in which Division One similarly held that the economic-loss rule bars fraud claims.

C. Review is necessary under RAP 13.4(b)(4), because the errors in Division Two's decision are issues of substantial public interest.

1. Other cases involving the economic-loss rule are pending before this Court.

Currently pending before this Court are at least three cases in which Washington's economic-loss rule is at issue. *Carlile v. Harbour Homes, Inc.*, no. 82812-1; *Affiliated FM Ins. Co. v. LTK Consulting Servs.,*

Inc., no. 82738-9; *Eastwood d/b/a Double KK Farm v. Horse Harbor Found., Inc., et al.*, no. 81977-7. Clearly, the recurring nature of this issue, its dispositive effect on claims, and the courts' inconsistent treatment of the rule all compel acceptance of review here.

2. RCW 18.86 *et seq.* abrogated fiduciary duties of real estate professionals.

Real estate professionals no longer owe fiduciary duties under RCW 18.86 *et seq.* In interpreting a statute, Washington courts first look to a "statute's plain language and ordinary meaning." *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481 (1999). Here, the plain language of RCW 18.86 clearly demonstrates that the pre-existing fiduciary duties of real estate professionals have been abrogated.

RCW 18.86 effectively abrogated fiduciary duties because the plain language of the statute establishes that real estate professionals possess limited duties. For example, the duties of a seller's agent are limited to those expressly enumerated in the statute:

> Unless additional duties are agreed to in writing signed by a seller's agent, the **duties of a seller's agent are limited to those set forth in RCW 18.86.030 and the following**, which may not be waived except as expressly set forth in (e) of this subsection: ...

RCW 18.86.040(1) (emphasis added). The statute similarly limits the duties of buyers' agents and dual agents to those enumerated in the relevant sections. *See* RCW 18.86.030, .050, .060. The statute establishes

that it "supersedes only the duties of the parties under the common law, including **fiduciary duties** of an agent to a principal, to the extent inconsistent with this chapter." RCW 18.86.110 (emphasis added). Thus, fiduciary duties that predated RCW 18.86 that the statute does not enumerate are necessarily abrogated as inconsistent with the statute.

Even though the plain language of RCW 18.86 *et seq.* enumerates the entire universe of real estate professionals' duties, Division Two's decision completely ignored the statute's effect on pre-existing fiduciary duties. It held that "chapter 18.86 RCW does not abrogate professional and fiduciary duties of real estate agents." *Jackowski*, 151 Wn. App. at 14. Division Two failed to analyze the statute fully in so holding. Division Two noted only that "RCW 18.86.110 specifically retains common law duties, only superseding them where and to the extent that they are inconsistent with the statute." *Id.* (citing RCW 18.86.110).

When it was drafted in 1996, RCW 18.86 was known as "Real Estate Agency Simplified Now," or "REASN." CP 866, 925. Attorney Douglas S. Tingvall was the principal drafter of REASN. CP 930. Mr. Tingvall wrote an article for the September 1996 issue of the Washington State Bar Association's *Bar News* titled "REASN Comes to Real Estate Brokerage." CP 866. Mr. Tingvall's article notes that RCW 18.86 "replaces common law fiduciary duties with statutory duties." CP 925; *see also* CP 929. Under prior common law, a real estate agent

historically owed "stringent fiduciary duties" to his client, the seller, CP 925, but under the statute, "[t]he common law fiduciary duty of undivided loyalty is replaced by a limited duty[.]" CP 929.

Professor William Stoebuck, the drafter of the 18 *Wash. Prac.* Ch. 15 treatise on the law governing real estate professionals in Washington, agrees. In this treatise, he notes that RCW 18.86

> redefined the relationships real estate brokers have to clients and among themselves, especially the agency and subagency relationships. The provisions of Chapter 18.86 may affect many aspects of brokers' duties and relationships.

Id. at § 15.1. In explaining the ways in which the statute altered duties possessed by real estate professionals, he observed:

> Before the legislature intervened in 1996, Washington common law regarded the selling broker as a subagent of the listing broker, who of course is the seller's agent. Thus, the selling broker was a fiduciary of the seller, with the same legal duties to that person as the listing broker. This relationship, though sound on common law principles, was contrary to the assumptions of most buyers[.] ... In 1996, at the urging of the Washington Association of Realtors, the legislature adopted what is now RCW Chapter 18.86[.] ... In addition to the relationships that are involved in sales through multiple listing agencies, Chapter 18.86 clarifies and modifies a number of other aspects of brokerage agency relationships.

Id. at § 15.5. *See also id.* at § 15.10 (RCW 18.86 "appears to alter, if not nullify, the rules adopted in *Hoffman v. Connall* and the other cases cited in this section"). Professor Stoebuck also favorably cites Mr. Tingvall's article. *Stoebuck*, 18 *Wash. Prac.* § 15.5 n.2.

However, RCW 18.86.030, .040, .050, and .060 enumerate all the duties that real estate professionals owe. Common-law duties — including fiduciary duties that predated the statute — that the statute does not enumerate are necessarily inconsistent with the statute and thus superseded. "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *Davis v. Dept. of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (quoting *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996)). Division Two's decision ignores, and thus improperly renders meaningless, the words "limited to" in RCW 18.86.040, .050, and .060 and contradicts the plain reading of the statute.

Comparison of RCW 18.86 to common-law fiduciary duties shows plainly that the two conflict and that the former therefore abrogated the latter. For example, this Court in *Mersky v. Multiple Listing Bureau of Olympia, Inc.*, 73 Wn.2d 225, 437 P.2d 897 (1968), set out high, virtually absolute, common-law fiduciary duties of real estate professionals. *Mersky* is but one of many cases that set out the old law, which "by uncompromising rigidity" imposed a "rule of undivided loyalty[.]" *Id.* at 232. RCW 18.86 explicitly rewrites that prior law. For example, the statute: (1) permits a single brokerage to represent multiple sellers at the same time, even though their interests might compete and conflict, RCW 18.86.050(2)(b); (2) permits a single brokerage to represent multiple

buyers at the same time, even though their interests might compete and conflict, RCW 18.86.050(2)(b); (3) permits **dual** agency, by which a real estate licensee "has entered into an agency relationship with both the buyer and seller in the same transaction," RCW 18.86.010(7); (4) permits dual agents to show other properties to a client-buyer, even after the buyer has made an offer to buy a client-seller's property, though that conflicts with the seller's interests, RCW 18.86.060(3(a); and (5) permits a dual agent to market the property even after a client-buyer has made an offer to buy it, even though that might not be in the buyer's interests, RCW 18.86.060(4)(a). Common-law fiduciary duties prohibit such conduct and directly conflict with these provisions of RCW 18.86. Thus the statute supersedes that common law of fiduciary duties.

Division Two wrongly disregarded these changes to the common law. Its *Jackowski* decision thereby affects the relationships of all real estate professionals and their clients in Washington, is thus an issue of significant public interest, and warrants review by this Court.

3. Review is necessary under RAP 13.4(b)(4) because Division Two's decision creating statutory causes of action under RCW 18.86 is an issue of substantial public interest.

Division Two also wrongly implied that RCW 18.86 *et seq.* created new statutory causes of action. *Jackowski*, 151 Wn. App. at 14-15. This contradicts the plain language of the statute, which establishes that the

chapter "supersedes **only the duties** of the parties under common law," and that the "common law continues to apply to the parties in all other respects." RCW 18.86.110 (emphasis added). No language of RCW 18.86 *et seq.* indicates any intent to create new statutory causes of action. Beyond question, the Legislature enacted RCW 18.86 in an effort to clarify and especially to **limit the liability** of real estate agents and brokers. *See generally* § V.C.2, *supra.*

Division Two's decision flouts that legislative intent by recognizing a new statutory cause of action that did not previously exist. In addressing supposed "statutory claims" under RCW 18.86 *et seq.*, Division Two effectively created new causes of action and justified its erroneous exception to the economic-loss rule. These erroneous holdings have broad ramifications for the potential liability of every real estate broker or agent in the State of Washington and therefore present issues of substantial public interest. Accordingly, this Court should accept review for that reason, pursuant to RAP 13.4(b)(4).

VI. CONCLUSION

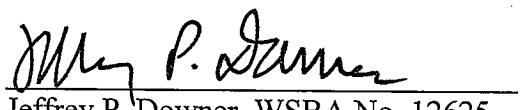
No basis exists to except "common law claims," "statutory claims," or professional-malpractice claims from the economic-loss rule. Division Two's attempt to do so here contravenes this Court's holding in *Berschauer/Phillips*. Furthermore, the continued application of fiduciary duties to real estate professionals contradicts the plain language of RCW

18.86 *et seq.* Similarly, RCW 18.86 provides no statutory causes of action.

Accordingly, Hawkins Poe respectfully asks this Court to grant review, reverse Division Two, and reinstate the summary judgment order that the trial court correctly entered in this action.

Respectfully submitted this 8th day of September, 2009.

LEE SMART, P.S., INC.

By: 

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on September 9, 2009, I caused service of the foregoing Petition for Review on each and every attorney of record herein:

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TIMOTHY L. JACKOWSKI and ERI JACKOWSKI, husband and wife, Appellants, v. DAVID BORCHELT and ROBIN BORCHELT, husband and wife; HAWKINS-POE, INC. dba COLDWELL BANKER HAWKINS-POE REALTORS; HIMLIE REALTY, INC., and VINCE HIMLIE, Broker for WINDEMERE HIMLIE REAL ESTATE, real estate brokers, and ROBERT JOHNSON and JEF CONKLIN, real estate agents, Respondents.	No. 36944-3-II ORDER AMENDING OPINION

Respondents, Hawkins-Poe, Inc. and Robert Johnson, move this court for reconsideration of the published opinion issued on June 16, 2009. The opinion is amended as follows:

In the second paragraph on page 10, RCW 18.86.040(1)(c) is deleted and RCW 18.86.050(1)(c) is inserted in its place.

IT IS SO ORDERED.

DATED this _____ day of _____, 2009.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TIMOTHY L. JACKOWSKI and ERI JACKOWSKI, husband and wife, Appellants, v. DAVID BORCHELT and ROBIN BORCHELT, husband and wife; HAWKINS-POE, INC. dba COLDWELL BANKER HAWKINS-POE REALTORS; HIMLIE REALTY, INC., and VINCE HIMLIE, Broker for WINDEMERE HIMLIE REAL ESTATE, real estate brokers, and ROBERT JOHNSON and JEF CONKLIN, real estate agents, Respondents.	No. 36944-3-II PUBLISHED OPINION

Bridgewater, J. — Following landslide damages to their waterfront home, Timothy and Eri Jackowski appeal the Mason County Superior Court's summary judgment dismissal of their fraud and misrepresentation claims against the seller, the seller's agent, and the Jackowskis' own real estate agent. The Jackowskis also fault the trial court for granting their real estate agent's motion to strike the Jackowskis' jury demand. We affirm in part and reverse and remand in part.

FACTS

Hawkins-Poe Real Estate and its real estate agent, Robert Johnson, represented the

Jackowskis in a real estate transaction for the purchase of a waterfront home in Mason County from the sellers, David and Robin Borchelt. Windermere Himlie Real Estate and its agent, Jef Conklin, represented the Borchelts in the transaction.

The Jackowskis purchased the house from the Borchelts in 2004. The majority of the Jackowskis' claims involve the Borchelts' actions several years before the sale. For example, several years before the transaction, the Borchelts sought and received a slope stability report from geologist Harold Parks while preparing to add an additional bedroom to the house. The slope drawing attached to the report indicates "New building addition to be west of house." CP at 1223. Parks stated during his deposition that adding the bedroom would not create any additional instability for the house. He indicated that the slope down to the water was unstable only within the first 25 feet of the shoreline, especially within the first 10 feet. He noted that the house was not within 25 feet of the shoreline. In 2002, the Borchelts built the addition to the north of the house instead of the west.

The Borchelts then attempted to improve a road going from their house, down the slope, and to the water, but the county issued a stop-work order. The county ordered the Borchelts to revegetate the slope, requiring at least 90 percent of the plants to survive.

At the time of the sale to the Jackowskis, the parties signed a Residential Real Estate Purchase and Sale Agreement (RESPA) and the Borchelts completed a real property transfer disclosure statement (Form 17), which they provided to the Jackowskis before closing. The Borchelts checked the box labeled "NO" on Form 17 in response to the following questions:

4. STRUCTURAL

. . . .

E. Has there been any settling, slippage, or sliding of the property or its

improvements?

CP at 921.

7. GENERAL

. . . .

B. Does the property contain fill material?

C. Is there any material damage to the property from fire, wind, floods, beach movements, earthquake, expansive soils, or landslides?

10. FULL DISCLOSURE BY SELLERS

. . . .

A. Other conditions or defects:

Are there any other existing material defects affecting the property that a prospective buyer should know about?

CP at 922. The Borchelts amended Form 17 on May 13, 2004, to include the following language:

Please refer to Mason County Dept. of Community Development letter attached regarding restoration bond of $4,400.

CP at 923. The letter indicates that the "following critical areas are present on this property: . . . Landslide Hazard Areas."[1] CP at 549. The letter also referenced the geotechnical report conducted by geologist Harold Parks.

The Borchelts faxed a copy of the letter to Conklin, their real estate agent. The fax included an addendum, provided by Parks, which again referenced his geotechnical report. Conklin faxed the letter and addendum to Johnson, who then gave them to the Jackowskis. Tim Jackowski admitted receiving and reading both the letter and Park's addendum the day after he made his purchase offer.

The parties included an inspection addendum to the RESPA that provided:

[1] The "Landslide Hazard Areas" language is circled along with "Aquatic Management Areas." CP at 549.

> INSPECTION CONTINGENCY. The above Agreement is conditioned on Buyer's personal approval of an inspection of the Property and the improvements on the Property. Buyer's inspection may include, at Buyer's option, the structural, mechanical and general condition of the improvements to the Property, compliance with building and zoning codes, an inspection of the Property for hazardous materials, a pest inspection, and a soils/stability inspection.

CP at 540. The contingency allowed the Jackowskis 15 days to provide a notice of disapproval, with three days provided for the Borchelts to respond. The Jackowskis did not conduct any investigation regarding soil stability before the sale closed. The sale closed on June 30, 2004.

On February 3, 2006, the house slid such that sheetrock cracked and doors stuck. The Jackowskis sued the Borchelts seeking rescission, or in the alternative, damages for fraud, negligent misrepresentation, or breach of contract. The Jackowskis sued Hawkins-Poe, Johnson, Windermere Himlie Real Estate, and Conklin, alleging that they knew or should have known and failed to disclose that the property was in a landslide area. The trial court allowed the Jackowskis to amend their complaint to include claims that Hawkins-Poe and Johnson violated RCW 18.86.050(1)(c) by failing to advise the Jackowskis during the pendency of the real estate transaction to seek the advice of a geotechnical expert, but it denied the Jackowskis' request to include breach of contract claims against Hawkins-Poe and Johnson. The Jackowskis' claims all relate to alleged fraud or misrepresentation regarding the risk of landslides on the property and about the presence of fill on the property.

BORCHELTS

The Borchelts moved for summary judgment on all of the Jackowskis' claims against them, including the Jackowskis' claims for rescission of the sale agreement, fraudulent misrepresentation, constructive fraud, and negligent misrepresentation. The Borchelts argued

before the trial court that the Jackowskis' breach of contract claim should fail because the Jackowskis failed to respond to the portion of the Borchelts' motion for summary judgment regarding breach of contract. The trial court agreed and granted that portion of the Borchelts' motion.

The trial court then granted the Borchelts' motion regarding the Jackowskis' negligent misrepresentation claims based on the economic loss rule as described in *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007). The trial court next dismissed the Jackowskis' fraud and fraudulent concealment claims relating to Form 17 because it found that the Jackowskis failed to satisfy the statute of limitations for such claims.[2]

To the extent that any of the Jackowskis' fraud claims regarding the landslide issue fell outside of Form 17, the trial court granted the Borchelts' summary judgment motion because the evidence showed that the Borchelts disclosed to the Jackowskis in written form that the property was in a landslide area. The trial court also noted that a reasonable investigation, which the Jackowskis made their acceptance contingent on, would have revealed the landslide issue. With regard to the issue of whether there was fill on the property, the trial court granted summary judgment on all fraud claims outside of Form 17, again stating that a reasonable investigation would have revealed the presence of the fill.

The trial court denied one of the Borchelts' summary judgment requests. Specifically, the trial court denied summary judgment regarding the fraudulent concealment claim arising from

[2] RCW 64.06.020, which addresses the seller's disclosure duty and the minimum information that Form 17 must include, provides that the buyer has three days after he or she receives the disclosure statement to rescind the contract.

cracks in the basement slab that the Borchelts allegedly covered in order to conceal the defects. We do not address the concrete slab issue here.

HAWKINS-POE AND JOHNSON

The trial court granted Hawkins-Poe and Johnson's first motion for summary judgment regarding negligent misrepresentation claims against them based on similar circumstances in *Alejandre*, 159 Wn.2d 674, where the buyer knew of potential issues, but failed to investigate. The trial court dismissed Hawkins-Poe and Johnson without addressing any other claims that the Jackowskis brought against them, including the breach of duty claims under RCW 18.86.050(1)(c).

When the Jackowskis alleged that valid claims remained against Hawkins-Poe and Johnson, Johnson and the agency filed another motion for summary judgment seeking to dismiss any remaining claims against them based on the economic loss rule. The trial court granted Hawkins-Poe and Johnson's second summary judgment motion in its entirety and again dismissed Hawkins-Poe and Johnson from the lawsuit.

By separate motion, the trial court granted Hawkins-Poe and Johnson's summary judgment request to strike the Jackowskis' jury demand. The Borchelts joined that motion.

WINDERMERE HIMLIE AND CONKLIN

The trial court partially granted Windermere Himlie and Conklin's motion for summary judgment, finding that the Jackowskis received written information disclosing that the property was in a landslide hazard area and that a reasonable inspection of the area would have disclosed the existence of fill on the property. The trial court dismissed all claims against Windermere

Himlie and Conklin arising out of the alleged nondisclosure of the landslides on the property and on other property and on all claims involving fill on the property. The trial court did not address the economic loss rule in regard to Windermere and Conklin's summary judgment requests because they did not brief the issue.

As with the Borchelts, the trial court denied the motion regarding the Jackowskis' fraudulent concealment claim involving cracks in the basement slab that the Borchelts repaired, covered with carpet, and failed to disclose.

The Jackowskis appeal.

ANALYSIS

Standard of Review

A trial court should grant a motion for summary judgment when there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law. CR 56(c). We review summary judgment orders de novo, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party. *Lam v. Global Med. Sys. Inc.*, 127 Wn. App. 657, 661 n.4, 111 P.3d 1258 (2005).

I. Economic Loss Rule

The Jackowskis first contend that the economic loss rule did not apply to their situation because their lives were at risk, which places their claims inside the realm of tort law. We disagree. As an initial matter, we note that the trial court did not grant summary judgment in favor of Windermere Himlie and Conklin based on the economic loss rule because they did not argue it, so we limit this discussion to the Borchelts, Hawkins-Poe, and Johnson.

In *Alejandre*, our Supreme Court addressed the economic loss rule in detail. *Alejandre*, 159 Wn.2d at 681-82. "The economic loss rule applies to hold parties to their contract remedies when a loss potentially implicates both tort and contract relief." *Alejandre*, 159 Wn.2d at 681. It is a "device used to classify damages for which a remedy in tort or contract is deemed permissible, but are more properly remediable only in contract." *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 822, 881 P.2d 986 (1994). The rule prohibits parties from recovering economic losses in tort claims when the entitlement to recovery comes from the contract. *Alejandre*, 159 Wn.2d at 682.

"Tort law has traditionally redressed injuries properly classified as physical harm." *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 420, 745 P.2d 1284 (1987). It concerns legal obligations rather than bargained-for obligations and serves as a "safety-insurance policy" requiring that products and property that parties sell do not "unreasonably endanger the safety and health of the public." *Alejandre*, 159 Wn.2d at 682 (quoting *Stuart*, 109 Wn.2d at 421).

> In short, the purpose of the economic loss rule is to bar recovery for alleged breach of tort duties where a contractual relationship exists and the losses are economic losses. If the economic loss rule applies, the party will be held to contract remedies, regardless of how the plaintiff characterizes the claims. Washington law consistently follows these principles. The key inquiry is the nature of the loss and the manner in which it occurs, i.e., are the losses economic losses, with economic losses distinguished from personal injury or injury to other property. If the claimed loss is an economic loss and no exception applies to the economic loss rule, then the parties will be limited to contractual remedies.

Alejandre, 159 Wn.2d at 683-84 (internal citations omitted).

The Jackowskis contend that because the slide was a "sudden, dangerous event, causing

damage to property and threatening life," that tort remedies should be available. Br. of Appellant at 19. We disagree.

The Jackowskis' attempt to reclassify the circumstances in their case as pure, life-threatening, tort claims fails. All the claims the Jackowskis brought stem from their RESPA and the related Form 17 for the purchase of the residential property and their relationships with the sellers and agents involved in the transaction. Accordingly, the Jackowskis' claims seek economic damages rather than redress for physical harm. The trial court did not err by finding that the economic loss rule applied to bar the Jackowskis' negligent misrepresentation claims.

II. Claims Against the Real Estate Companies and Their Agents

The Jackowskis next contend that even if the economic loss rule precluded their negligent misrepresentation claims against the Borchelts, the trial court erred by applying it to all of their statutory claims against Hawkins-Poe and Johnson.[3] In particular, the Jackowskis contend that their claims that Hawkins-Poe and Johnson breached statutory duties owed under RCW 18.86.030, as well as common law duties should have survived summary judgment dismissal. We agree.

The Jackowskis correctly note that RCW 18.86.110 specifically retains common law duties, only superseding them where and to the extent that they are inconsistent with the statute.

> This chapter supersedes only the duties of the parties under the common law, including fiduciary duties of an agent to a principal, to the extent inconsistent with this chapter. The common law continues to apply to the parties in all other respects.

[3] We note that the Jackowskis amended their complaint to allege statutory violations against Hawkins-Poe and Johnson and did not do so regarding Windermere Himlie and Conklin. Accordingly, we consider only Hawkins-Poe and Johnson in this section.

RCW 18.86.110. For clarity, we reiterate that chapter 18.86 RCW does not abrogate professional and fiduciary duties of real estate agents.

Neither do we believe that the economic loss rule, as described in *Alejandre*, abrogates all professional malpractice claims, particularly where a client hires a professional and, therefore, establishes a privity of contract with that professional. We distinguish this holding from *Alejandre*, which did not involve a buyer suing his real estate agent, but rather, suing the seller. *Alejandre*, 159 Wn.2d at 680. We are not willing at this time to expand our Supreme Court's holding in *Alejandre* to preclude all recovery for economic loss against professional agents, as to do so would be to abrogate professional malpractice claims for all cases not involving physical harm. We do not believe this to be the *Alejandre* court's intention.

The Jackowskis cite *Alejandre* for the proposition that "'tort law is not intended to compensate parties for losses suffered as a result of a *breach of duties assumed only by agreement.*'" Br. of Appellant at 23 (quoting *Alejandre*, 159 Wn.2d at 682). They allege that Hawkins-Poe and Johnson breached statutory and common law duties, not duties assumed only by agreement.

Specifically, they allege that Hawkins-Poe and Johnson violated their duties to the Jackowskis under RCW 18.86.030(1)(a), which requires agents to exercise reasonable skill and care. They contend that Hawkins-Poe and Johnson violated the RCW 18.86.030(1)(c) requirement that agents transmit all written communications to and from either party in a timely manner. The Jackowskis allege that Hawkins-Poe and Johnson violated the RCW 18.86.040(1)(c) duty to advise the buyer to seek expert advice on matters relating to the

transaction that are beyond the agent's expertise. Accordingly, we hold that the trial court erred by dismissing the Jackowskis' statutory and common law claims against Hawkins-Poe and Johnson under the economic loss rule.

III. Rescission

The Jackowskis contend that the trial court erred by precluding them from rescinding the contract because neither the economic loss rule nor RCW 64.06.030 abrogate the equitable remedy of rescission for negligent misrepresentation claims. Because we resolve this issue based on common law rescission, we do not address chapter 64.06 RCW rescission.

The Jackowskis contend that they should be entitled to common law rescission because RCW 64.06.070 provides:

> Except as provided in RCW 64.06.050, nothing in this chapter shall extinguish or impair any rights or remedies of a buyer of real estate against the seller or against any agent acting for the seller otherwise existing pursuant to common law, statute, or contract; nor shall anything in this chapter create any new right or remedy for a buyer of residential real property other than the right of rescission exercised on the basis and within the time limits provided in this chapter.

The Jackowskis allege that, although *Alejandre* barred monetary recovery for economic loss damages against a seller in a negligent misrepresentation claim, rescission is not a recovery and, thus, should still be available to them. After all, they pleaded in the alternative for either rescission of the contract or damages.

> Contract rescission is an equitable remedy in which the court attempts to restore the parties to the positions they would have occupied had they not entered into the contract. *Hornback v. Wentworth*, 132 Wn. App. 504, 513, 132 P.3d 778 (2006), *review granted*, 158 Wn.2d 1025, 152 P.3d 347 (2007).

Bloor v. Fritz, 143 Wn. App. 718, 739, 180 P.3d 805 (2008). A court sitting in equity has broad

discretion in shaping relief. *Hough v. Stockbridge*, 150 Wn.2d 234, 236, 76 P.3d 216 (2003).

As an initial matter, the Jackowskis acknowledge that many attorneys have argued that *Alejandre* precludes the equitable remedy of rescission for misrepresentation and that the common language those attorneys cite is "the economic loss rule precludes any recovery under a negligent misrepresentation theory." Br. of Appellant at 39 (quoting *Alejandre*, 159 Wn.2d at 677). Nevertheless, they argue that rescission is an avoidance of contract rather than a recovery. They contend that they should be entitled to relief because they entered into a contract based on misrepresentations. We agree.

They cite a post-*Alejandre* case, *Ross v. Kirner*, 162 Wn.2d 493, 172 P.3d 701 (2007), alleging that our Supreme Court has allowed a buyer of real estate to seek rescission for a negligent misrepresentation tort claim. It is true that one of the buyer's underlying requests was to rescind the contract. *Ross*, 162 Wn.2d at 497-98. But the *Ross* court did not address *Alejandre* or the economic loss rule, nor did the parties address them. *Ross*, 162 Wn.2d at 500. Instead, the *Ross* court found that undisputed evidence did not establish as a matter of law that the respondent committed negligent misrepresentation and a trial should occur to make that determination. *Ross*, 162 Wn.2d at 500. While we note the differences between *Ross* and this case, we nevertheless hold that the trial court erred by dismissing the Jackowskis claims that they should be able to rescind the contract.

IV. Breach of Contract Claims - Borchelts

The Jackowskis contend that the trial court erred by dismissing their breach of contract claims against the Borchelts. The trial court dismissed the Jackowskis' breach of contract claims

because it found that the Jackowskis did not respond to the Borchelts' summary judgment argument regarding breach of contract. The Jackowskis listed breach of contract claims against the Borchelts in their complaint. However, the Borchelts did not make a summary judgment argument regarding breach of contract. The Jackowskis nevertheless mentioned the breach of contract claim in their response to the Borchelts' summary judgment motion, but only as an example of claims that survive the economic loss rule. Accordingly, we hold that the Jackowskis' breach of contract claims were not before the trial court for summary judgment dismissal and accordingly, such dismissal was in error.

V. Reasonable Reliance - Fill and Landslides

The Jackowskis contend that the trial court erred by finding that their reliance on the alleged misrepresentations and fraudulent statements was not reasonable. To the extent that the Jackowskis argue that they reasonably relied on the statements as proof of negligent misrepresentation, their argument fails under the economic loss rule. *Alejandre*, 159 Wn.2d at 683. Because the Jackowskis' fraud and fraudulent concealment claims fall outside the scope of the economic loss rule, we will address them briefly. *Alejandre*, 159 Wn.2d at 689, 690.

We clarify that the Jackowskis sued the Borchelts alleging both fraud and fraudulent concealment, while alleging only fraudulent concealment against Hawkins-Poe, Johnson, Windermere Himlie, and Conklin. In a fraudulent concealment claim, the plaintiff must prove the defect would not have been disclosed by a careful, reasonable inspection by the purchaser. *Alejandre*, 159 Wn.2d at 689. Similarly, in a fraud claim, the plaintiff must establish that he had a right to rely on the representation. *See Williams v. Joslin*, 65 Wn.2d 696, 697, 399 P.2d 308

(1965).

Here, as we discussed above, the Jackowskis had knowledge of the landslide hazard area and, thus, reliance on the Form 17 disclosure could not be reasonable. A reasonable inspection would have disclosed the landslide risk. The Jackowskis acknowledge that they had read the letter indicating that the property that they were contracting to buy was in a landslide hazard area. Tim Jackowski read documents before closing that referenced an existing geotechnical report. Tim Jackowski acknowledged that he made the sale contingent on his ability to hire professionals to conduct property inspections including soil and slope stability. Nevertheless, he failed to utilize the contingency to request such inspections. The trial court did not err by granting summary judgment on the Jackowskis' fraudulent concealment claims based on the landslide risk.

However, we are not convinced to the same extent regarding the fill issue. The Jackowskis' expert, David Strong, testified in deposition that the presence of fill was "obvious." CP at 141.1.

> Q. And I also understand that in your inspection of the property, you said the presence of fill was obvious, or something to that effect; is that correct?
> A. I believe so, yeah.
> Q. So any competent soils inspector, reviewing the property, would have been able to see there was fill on the property?
> A. Yes.

CP at 141.1. However, his property evaluation occurred after the sliding event and does not help us decide whether the presence of fill would have been disclosed with a careful, reasonable inspection at the time of the sale.

Architect Randall Thompson stated in his declaration that when he inspected the property following the slide that the "fill is apparent and is located along the north boundary line of the

property and is armored with quarry rock." Suppl. CP at 1402. Further, the "fill appears to be as much as 15 feet deep along that edge, and that is only 12 feet north of the north foundation wall of the addition." Suppl. CP at 1402. Again, Thompson based these statements on what he observed when he inspected the property after the sliding event.

Accordingly, the Borchelts were not entitled to summary judgment dismissal of the fill issue as a matter of law for the Jackowskis' fraud and fraudulent concealment claims.

VI. Jury Demand

We next address whether the trial court erred by granting the Borchelts' motion to strike the Jackowskis' jury demand. The Jackowskis contend that we have allowed plaintiffs who pleaded remedies in the alternative, even inconsistent remedies such as rescission of contract through avoidance and damages based on affirmation of the contract, to hold off on electing a remedy, instead of prosecuting both through final judgment. At final judgment, the trial court's election becomes the pleading party's choice. *Stryken v. Panell*, 66 Wn. App. 566, 571, 832 P.2d 890 (1992). The Jackowskis argue that because they pleaded both rescission and damages, they are entitled to wait and see what remedy the trial court will find appropriate and will accept the trial court's decision at that time.

There is a right to a jury trial where the civil action is purely legal in nature. *Peters v. Dulien Steel Prods., Inc.*, 39 Wn.2d 889, 239 P.2d 1055 (1952). Conversely, there is no right to a jury trial where the action is purely equitable in nature. *Dexter Horton Bldg. Co. v. King County*, 10 Wn.2d 186, 116 P.2d 507 (1941); *Knudsen v. Patton*, 26 Wn. App. 134, 137, 611 P.2d 1354, *review denied*, 94 Wn.2d 1008 (1980). "The overall nature of the action is determined by considering all the issues raised by all of the pleadings." *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 365, 617 P.2d 704 (1980). In determining whether an action is primarily equitable or is an action at law, we grant the trial court wide discretion and will not disturb that discretion absent clear abuse. *Brown*, 94 Wn.2d at 368.

The trial court should exercise its discretion with reference to a non-exhaustive list of factors including: (1) who seeks the equitable relief; (2) is the person seeking the equitable relief

also demanding trial of the issues to the jury; (3) are the main issues primarily legal or equitable in their nature; (4) do the equitable issues present complexities in the trial which will affect the orderly determination of such issues by a jury; (5) are the equitable and legal issues easily separable; (6) if the nature of the action is doubtful, a jury trial should be allowed; and (7) the trial court should go beyond the pleadings to ascertain the real issues in dispute before making the determination as to whether to grant a jury trial on all or part of the issues. *Scavenius v. Manchester Port Dist.*, 2 Wn. App. 126, 129-30, 467 P.2d 372 (1970).

Applying these factors to the current case, the Jackowskis seek the equitable relief, rescission. The Jackowskis also demand a jury trial. One of the main issues is whether the Jackowskis are entitled to rescind the contract, which is clearly equitable. They seek, in the alternative, damages resulting from fraud, negligent misrepresentation, and breach of contract, in amounts to be proven at trial. The complexities at trial could affect the orderly determination of issues by the jury. We cannot say, however, that the trial court abused its discretion where a major basis of the claim, the rescission request, is equitable. We hold that the trial court did not err by granting the Borchelts' motion to strike the Jackowskis' jury demand.

VII. Attorney Fees on Appeal

The Jackowskis request attorney fees on appeal under terms authorized in the contract. RAP 18.1 allows attorney fees on appeal if they are authorized by applicable law. The RESPA provides that if either party institutes a suit against the other, the prevailing party is entitled to attorney fees and expenses. The Jackowskis cite RCW 4.84.300 in support of their request, but not only is this an incorrect citation, it applies only to damage actions of $10,000 or less. RCW

4.84.250. RCW 4.84.260 provides that the prevailing party is the party that receives recovery that totals as much as or more than the amount offered in settlement. None of this information is available to us at this time.

We affirm summary judgment dismissal of the Jackowskis' negligent misrepresentation claims against the Borchelts based on the economic loss rule. We reverse and remand for trial the Jackowskis' statutory and common law claims against Hawkins-Poe and Johnson. We reverse the trial court and hold that common law rescission is not precluded by the economic loss rule. We affirm summary judgment dismissal on all claims against Windermere Himlie and Conklin based on the Jackowskis' knowledge of the landslide risk. We affirm summary judgment dismissal of all fraud and fraudulent concealment claims relating to the landslide issue for all parties because a reasonable inspection would have revealed the risk and because the Jackowskis' knew that the property was within a landslide hazard area. We reverse and remand the Jackowskis' fraud and fraudulent concealment claims relating to the presence of fill on the property. We hold that the trial court did not abuse its discretion by striking the Jackowskis' jury demand. We reverse and remand the trial court's dismissal of the Jackowskis' breach of contract claims against the Borchelts as they were not properly before the trial court for dismissal. We deny attorney fees on appeal because the Jackowskis fail to inform us how they are the prevailing party.

Bridgewater, J.

We concur:

Armstrong, J.

Penoyar, A.C.J.